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No. 90-782

In The

Supreme Court of the United States

October Term, 1990

BOB ODOM, ET AL.,

Petitioners,

versus

DONALD M. JOHNSON,

Respondent.

Petition For A Writ Of Certiorari to the United States Court Of Appeals For The Fifth Circuit

RESPONSE BRIEF TO PETITION FOR CERTIORARI

MILTON DALE PEACOCK,
Counsel of Record
One Wood Street
Monroe, LA 71201
(318) 388-4205

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE BRIEF TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Please accept herein the response of Donald M. Johnson to the petitioners' request for review on the singular issue of whether they are entitled to absolute immunity from suit herein. It must not be forgotten that this matter comes to this honorable court seeking reversal of the denial of petitioners' motion for summary judgment on this issue. Two district courts denied this motion as did the federal appellate court. Petitioners now request, in their last attempt to avoid a trial on the merits, this

honorable court to garb them with the same absolute immunity accorded to the judiciary.

STATEMENT OF THE CASE

While petitioners have set forth the facts with some accuracy, there obviously exists the inevitable slant of the advocate which arises in every adversarial proceeding. Therefore, a less-biased factual recitation may be found in the magistrate's report and recommendation located at D-2 of petitioners' exhibits. He wrote:

> "The facts which form the basis of this suit are alleged to be as follows. Plaintiff alleges that he was approached on various occasions in 1980 and 1982 to provide monetary campaign contributions for Bob Odom, the Commissioner of Agriculture for the State of Louisiana. He alleges that he provided $150.00, but refused to pay the $500.00 requested. He alleges that because of such refusal he was subsequently charged with violating the Louisiana Pesticide Law. He asserts that the Louisiana Department of Agriculture encouraged perjured testimony to adjudicate plaintiff guilty of violating the Louisiana pesticide laws. He further alleges that defendants violated plaintiff's equal protection and due process rights by singling him out for prosecution and revocation of his license, and using evidence obtained against him unconstitutionally because of his failure to contribute to the campaign as requested. For the first motion for summary judgment, plaintiff submitted several affidavits to this effect."

To assist this honorable court in its review of the denial for summary judgment by allowing it to see what the

lower courts had before them, the respondent attaches in the Appendix to this brief seven (7) of the affidavits in the record.

The first district court to deny the petitioners' motion for summary judgment on the issue of absolute immunity stated as follows:

> "This court finds that the defendants are not entitled to absolute immunity. Odom, the members of the ACP, and Rinicker do not hold offices which demand such protection. In order for an official to be entitled to absolute immunity, he must show (1) that the responsibility of his office embraces a function so sensitive as to require a total shield from liability; and (2) that he was discharging the protected function when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2735, 73 L.Ed.2d 396 (1962). [Sic.] Here, the job duties of the defendants are not so sensitive as to require a total shield from liability."
>
> Petitioners' exhibits, E-7 fn.9.

The next district court to deny petitioners' claim for absolute immunity adopted a magistrate's report and recommendation, which in pertinent part set forth the following:

> "Although the Commissioner of Agriculture and the Commission serve as a fact finding body, they do not assert that anything resembling the safeguards applicable to the hearing examiners with the Federal Department of Agriculture are in effect with the Louisiana Department of Agriculture. The undersigned therefore agrees with the previous court ruling to the effect that the Commissioner of Agriculture and the Agriculture Commission are not officers which embrace

> a function so sensitive as to require a total shield from liability as contemplated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1967). [Sic.] Furthermore, the plaintiff in this case asserts that the Commission and Commissioner were engaged in activities which went beyond the decision-making process when they committed the alleged wrongs of which the plaintiff complains in this case."
>
> Petitioners' exhibits, D-8.

The Fifth Circuit Court of Appeal also denied petitioners' claim for absolute immunity. That court noted the following: "The affidavits submitted by Johnson support his allegations that the defendants encouraged others to commit perjury against Johnson and sought to harm his business by singling him out for prosecution and for revocation of his cropduster's license." Petitioners' exhibits, B-7. The court then expressly found that these "pleadings and affidavits contained allegations that Odom and the Commission members went beyond the scope of their decision-making authority when they committed the alleged wrongs." Petitioners' exhibits, B-9.

In denying petitioners' request for a rehearing, the Fifth Circuit used certain language which petitioners claim impermissibly added another "prong" to the absolute immunity criteria set forth in *Butz v. Economou*, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978). This petition for a writ of certiorari raises the single issue: Did the Fifth Circuit Court of Appeal erroneously fail to reverse the lower court's (in fact, only the second district court ruling adverse to petitioners was before the appellate court, inasmuch as petitioners did not seek review from

the first ruling found in Petitioners' exhibits, E-1, et seq.) denial of petitioners' motion for summary judgment on the sole issue of absolute immunity by wrongly adding another *Butz* safeguard?

ARGUMENT

It is submitted that petitioners' very able counsel has framed the issue and his argument in a fashion which might cause one at first blush to believe that merit exists therein. It is prayed that this response will adequately reveal the lack of merit to first blushes and to this writ application.

This honorable court does not need elucidation from this writer or an affliction of citationitis to set forth the standards of review pertaining to a motion for summary judgment. Fed. R. Civ. P. 56 (c) clearly and simply sets forth that a summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The appellate court correctly announced that principle (with appropriate caselaw) at B-7 of petitioners' exhibits. It is respectfully submitted that the motion for summary judgment was property denied under the particular facts of this case.

It appears clear that petitioners have abandoned for review at this stage their claim for qualified immunity. The Fifth Circuit correctly set forth the burden of overcoming such a qualified immunity claim thusly: "The

plaintiff must show that, at the time of the alleged violation, the defendants' actions were such that a reasonable officer would know they were unlawful." Petitioners' exhibits, B-5. The affidavits included in the Appendix meet this burden easily, certainly insofar as a motion for summary judgment is concerned.

The question before this court is whether the petitioners are entitled to absolute immunity on their motion for summary judgment in light of the extant affidavits and the law. Notwithstanding petitioners' Chicken Little claim that "the sky is falling" insofar as the absolute immunity afforded judges is involved, such is clearly not the case. Petitioner, Bob Odom, is an elected Louisiana official who is head of the Department of Agriculture. The record reflects that he has used his own employees to solicit campaign funds from the very individuals he is charged with regulating. The record, also, presents evidence that he attempts to crush economically those regulatees who do not acquiesce to his financial demands.

The affidavits allege that Mr. Odom and some of the petitioners are not adverse to creating from their own employees and using perjured testimony to accomplish their desired goals. The record further sets forth an invidious type of selective prosecution against the respondent which flies in the face of basic notions of fairness and equal protection.

Counsel for petitioners states, "Absolute judicial immunity is just that: absolute." Page 15 of Petitioner's application. That is the protection these petitioners seek. Respondent avers that the lower courts did not err in

denying these individuals that type of protection from their actions.

This honorable court has recognized (as to a state-court judge) that absolute judicial immunity is not absolute in the purest form that petitioners assert. See, e.g., *Forrester v. White*, 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988). In an unanimous opinion the court denied absolute judicial immunity for a state-court judge charged with sexual discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The court acknowledged that it "has generally been quite sparing in its recognition of claims to absolute official immunity." 484 U.S. at 224. The court further stated, " . . . we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own." Ibid at 226. And appropriate to this analysis is the following:

> "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."
>
> Ibid at 227.

In their application herein, petitioners implicitly ask this honorable court to consider their request for absolute immunity in light of their official roles without a *proper* consideration of the function at issue. Unlike a judge who performs necessary and limited functions in every case,

the petitioners herein, as to the state pesticide laws, perform all the functions in Louisiana of investigation, prosecution, testification, adjudication and penalty imposition.

Petitioners assert at page 11 of their application that they are "insulated from political influence." The affidavits factually allege an entirely different scenario. The Fifth Circuit recognized this when it denied petitioners' application for rehearing by stating that respondent "set forth sufficient facts at least to allege that the ACP was politically influenced by Odom and did not act independently. . . . " Petitioners' exhibit, A-2. In fact, the commission members petitioners are subject to the regulation and control of the petitioner Odom. The White affidavit, found in the Appendix beginning with A-1, avers that one of the petitioners violated the pesticide law on at least one occasion and was subject to punishment. However, his "sins" were washed away by the cleansing power of one of the other petitioners.

Selective enforcement of the laws by government officials has for some time been recognized as actionable. See, e.g., *LeClair v. Saunders*, 627 F.2d 606 (2nd Cir. 1980), certiorari denied 101 S.Ct. 1418. It is submitted that all three of the lower courts correctly denied petitioners' claim for absolute immunity for the reasons stated:

(1) "The job duties of the defendants are not so sensitive as to require a total shield from liability" (Petitioners' exhibit, E-7, fn. 9);

(2) The affidavits allege that petitioners "were engaged in activities which went beyond the decision-making process when they committed the alleged wrongs of which the plaintiff complains in this case" (Petitioners' exhibit, D-8); and

(3) "Johnson's pleadings and affidavits contained allegations that Odom and the Commission members went beyond the scope of their decision-making authority when they committed the alleged wrongs" (Petitioners' exhibit, B-9).

These decisions were not inconsistent with this court's rationale in *Butz v. Economou,* supra. They are entirely consistent with the court's ruling in *Forrester v. White,* supra.

There is a necessary interplay between *Butz* and *Harlow v. Fitzgerald,* 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). The Fifth Circuit recognized and properly applied that interplay in its opinion. See B-9 in petitioners' exhibits. Respondent will not paraphrase or restate that analysis and finding, which appears quite sound under the circumstances of this particular case.

CONCLUSION

Contrary to petitioners' assertions, the judiciary is not under attack herein. Nor has the Fifth Circuit in its ruling sought to add another "prong" to the three-part *Butz* test. In *Forrester v. White,* supra, this honorable court stated, "Absolute immunity, however is 'strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.' " (Cite omitted.) 484 U.S. at 230. The Fifth Circuit correctly recognized that these petitioners (defendants) are not entitled to the "strong medicine" available in *Butz.* They certainly have not made a showing that they are entitled to such a potion, and it is averred by the respondent herein that such a prescription, if allowed,

would prove a fatal dose to the citizenry of Louisiana who still seek for the elusive concept of "justice."

Respectfully submitted,

MILTON DALE PEACOCK
Attorney at Law
One Wood Street
Monroe, Louisiana 71201
(318) 388-4205

APPENDIX

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED FREDRICK C. WHITE, who after being by me first duly sworn, did depose and say that:

He was employed by the Louisiana Department of Agriculture (DOA) from early 1980 until October 1983, as Coordinator-Pesticide Enforcement.

During this period of time and during the scope of his employment with the DOA, he was aware of various details concerning the DOA's handling of numerous cases against Donald M. Johnson (Johnson), a crop duster in East Carroll Parish, who was the target of numerous investigations by the DOA.

As Coordinator-Pesticide Enforcement for the DOA, the affiant herein was instructed by Butch Calhoun and John Impson, officials with DOA, in the course of his employment to find anything he could against Johnson so that the DOA could use its authority to punish Johnson.

During the course of a meeting involving unclassified employees, the affiant heard Winston Riddick (the attorney for the DOA), Calhoun and Impson say that Johnson was to be made an example for other cropdusters who might choose to resist the DOA, because Johnson

fought the hardest against the DOA for what he believed to be right.

The affiant, who is personally aware of the three hearings held by the DOA in 1982 and 1983 against Johnson (and/or his corporation, Transylvania Flying Service, Inc.), was aware that the DOA, through its officials Calhoun and Impson, always wanted the maximum penalties available imposed on Johnson, which included large monetary fines and license and/or certification suspensions.

Furthermore, he shows that he was present during numerous conversations in 1982 and 1983 involving Calhoun and Impson, wherein the latter two stated that they needed to call members of the Advisory Commission on Pesticides (ACP) before hearings on charges against Johnson by the DOA in order to influence the vote of the ACP against Johnson. The affiant shows that it was a standard policy for Impson and Calhoun to call certain ACP members before violations hearing in order to influence the vote of the ACP against the target of the DOA.

The affiant shows that his knowledge of the power structure within the DOA causes him to believe that all of the decisions made against Johnson by the DOA were made with the knowledge and approval of Bob Odom, the Commissioner of the DOA, because all decisions involving significant matters had to be approved by the Commissioner.

Also, he shows that Impson, Calhoun and Riddick often had questions about the validity of some of the charges they filed against Johnson, but their approach was to charge him with every violation available, to get

the ACP to recommend a maximum fine and suspension and to make Johnson "spend some money" to defend himself.

The affiant shows that the activities of the aforementioned officials within the DOA resulted in the hearings against Johnson being mere shams more likened to "kangaroo courts."

He was further made aware that certain members of the ACP – in particular, Tom Cashio, Jeff Calloway and Grady Coburn – were more susceptible to the demands of the DOA made by Calhoun and Impson.

The affiant also shows that Calhoun discovered that one of the members of the ACP, Jeff Calloway, violated on at least one occasion the pesticide law of which the DOA was charged with enforcing, and that Calhoun took the steps necessary to insure that Calloway was *not* properly punished for his violation.

Additionally, he shows that he discovered another significant violation of the pesticide law by Ray Hensgens, which violation involved Azodrin and was corroborated by test results performed at the LSU lab. The affiant was told by Calhoun that these results were communicated to Impson and Odom, but the latter ordered new tests which results came back "clean" on the second run, thereby "exonerating" Hensgens, who was then a member of the ACP.

The affiant shows that it was very clear to him that the DOA was not treating Johnson fairly or even-handedly, and that Calhoun and Impson, in particular, were

intent upon making an example of Johnson, with the full approval and support of Odom.

He shows that there existed other cases where friends of Odom, Calhoun and Impson, who were blatantly guilty of pesticide violations, were given hand-slappings because of their friendship with "the Commissioner."

The affiant shows that the was also present during another meeting with DOA officials, when he overheard a conversation between Calhoun and Impson involving Johnson and Tommy Shields, an inspector with the DOA in East Carroll Parish. The affiant heard Impson and Calhoun discussing the fact that Sheilds was going to be brought down to Baton Rouge where he would either have to change his story against Johnson or be terminated from the DOA. The affiant shows that the "change in story" referred to false testimony Shields would be required to give against Johnson in order to help the ACP find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Fredrick C. White
FREDRICK C. WHITE

Sworn to and subscribed before me this 19th day of September, 1988, at Baton Rouge, Louisiana.

/s/ Janice G. Clark
NOTARY PUBLIC

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF MOREHOUSE

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JERRY DOLES, who after being by me first sworn, did depose and say that:

He was an inspector with the Louisiana Department of Agriculture (DOA) in the years 1981-1982, and he was closely associated with Tommy Shields, Jr., who was also an inspector at that time with the DOA. The affiant shows that in 1981 Shields told him that he (Shields) had to "change his story" about Donald M. Johnson in order to present false testimony that Johnson (a commercial aerial applicator at the time) had improperly applied the herbicide 245-T in 1981. The affiant shows that Shields told him that Shields had to present the perjured evidence because of strong pressure put upon him to do so by certain officals within the DOA, in particular, Bob Odom, the Commissioner of the DOA, and Dean Hart and Preston Johnson, Shields' local supervisors and employees in the DOA. The affiant shows that he understands the perjured testimony by Shields was necessary for the DOA to find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Jerry Doles
JERRY DOLES

Sworn to and subscribed before me this 6th day of September, 1988, at September, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF WEST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED William W. Head, Jr., who after being by me first sworn, did depose and say that:

He was an inspector with the Louisiana Department of Agriculture (DOA) in 1981 and was good friends with Tommy Shields, III, also an inspector the DOA. In 1981, Shields told the affiant that he had to "change his story" regarding Donald M. Johnson, a cropduster in East Carroll Parish, who Shields was investigating. Shields told the affiant that he had to fabricate the facts concerning a 245-T application by Johnson, because of instructions from his superiors in the DOA, Butch Calhoun and John Impson, who were intent upon finding Johnson guilty of violations of the Louisiana Pesticide Law.

Mike Kovac, a inspector with the DOA, told the affiant to go collect campaign contributions for Bob Odom, from John Vinning, who was a cropduster, in East Carroll and Don Raley who is in the Seed and Chimical business in EAst Carroll, both regulated by DOA/ The affiant said it was to be done on state time and state truck. The affiant said he talked to State Rep. Archie Crosby, and was told that it was unlawful for state

workers to do this, and the affiant said he would not collect campaign contributions for Bob Odom.

/s/ William W. Head, Jr.

Sworn to and subscribed before me this 28th day of September, 1988, at Oak Grove, Louisiana.

/s/ William H. Stephens
Notary Public

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF OUACHITA

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JACK RAY, who after being by me first sworn, did depose and say that:

He was an inspector and supervisor with the Louisiana Department of Agriculture (DOA) in the years 1981-1982 (as well as during other years) and was closely acquainted with Tommy Shields, Jr., who was an inspector with the DOA during this period of time. The affiant shows that Shields gave indications several times during 1981-1982 that he (Shields) had to "change his story" about Donald M. Johnson, a commercial aerial applicator in East Carroll Parish at that time. The affiant shows that Shields had direct reference to a 1981 aerial application by Johnson to a crop of the herbicide 245-T, which Shields would *falsely* testify to against Johnson. The affiant was led to believe that Shields had to present this perjured testimony against Johnson, because of pressure put on Shields by two of his supervisors in the DOA, Dean Hart and Preston Johnson. The purpose of this false evidence was to allow the DOA to find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Jack Ray
JACK RAY

Sworn to and subscribed before me this 9th day of September, 1988, at Monroe, Louisiana.

/s/ M Dale Peacock
NOTARY PUBLIC

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF EAST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JIMMY MUSE, who after being by me first sworn, did depose and say that:

He is a farmer in East Carroll Parish and has known Tommy Shields, Jr., for many years. In 1981 the affiant asked Donald M. Johnson, a cropduster in East Carroll Parish to apply to his rice crop the herbicide 245-T, but Johnson told the affiant that he could not apply the 245-T without a waiver from Shields, who was then an inspector with the Louisiana Department of Agriculture (DOA). The affiant contacted Shields who told the affiant to tell Johnson to go ahead and apply the 245-T and that Shields would give Johnson the required waiver later.

On December 7, 1982, the affiant testified in Baton Rouge, Louisiana, before the Advisory Commission on Pesticides (ACP) with the DOA as to the aforementioned facts. On that same day the affiant heard Shields also testify, but Shields denied under oath the true facts – i.e., he (Shields) had told the affiant and Johnson that the latter could apply the 245-T and that Shields would later give Johnson the requisite waiver.

/s/ Jimmy Muse
JIMMY MUSE

Sworn to subscribed before me this 1st day of September, 1988, at Transylvania, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF OUACHITA

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified,and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED WILLIAM D. BATEY, who after being by me first sworn, did depose and say that:

He was an entomologist and inspector with the Louisiana Department of Agriculture (DOA) from 1968 to 1985. In the winter of 1983, Bob Odom, the Commissioner of the DOA, told the affiant to collect campaign contributions for him in the amount of $500.00 from Brown McLemore and Ken Thornhill, two sweet potato farmers, whose crops the affiant was charged by the DOA with inspecting. Odom told the affiant to bear down on the farmers if they failed to contribute financially to Odom's re-election campaign. In following these orders, the affiant gave $100.00 in cash and collected $200.00 from each farmer. The affiant understood that he would lose his job with the DOA if he failed to follow Odom's orders.

/s/ William D. Batey
WILLIAM D. BATEY

Sworn to and subscribed before me this 27th day of September, 1988, at Monroe, Louisiana.

/s/ M Dale Peacock
NOTARY PUBLIC

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF EAST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED SHIRLEY FORTENBERRY, who after being by me first sworn, did depose and say that:

She had a phone conversation with Bob Odom, the Commissioner of the Louisiana Department of Agriculture (DOA), in the early spring of 1983. This conversation concerned Donald M. Johnson, a cropduster in East Carroll Parish, whom the DOA was punishing for alleged violations of the Louisiana Pesticide Law. Odom told the affiant that Johnson would have been "all right" if he would have just "kept his mouth shut" and "left everything alone." However, Odom said Johnson must receive the punishment prescribed for him by the DOA, because he would not accept his punishment quietly.

/s/ Shirley Fortenberry
SHIRLEY FORTENBERRY

Sworn to and subscribed before me this 1st day of September, 1988, at Transylvania, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC